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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 678

SALVATORE MAUGERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion (R. 197) of the circuit court of appeals is reported at 151 F. 2d 335.

JURISDICTION

The judgment of the circuit court of appeals was entered October 20, 1945 (R. 197–198), and a petition for rehearing was denied November 24, 1945 (R. 198). The petition for a writ of certiorari was filed December 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI

and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether petitioner was guilty of two separate and distinct offenses in concealing and facilitating the concealment of certain opium and in facilitating the transportation of the same opium a short time after the concealment.

2. Whether there was any evidence aside from petitioner's own extrajudicial statements to establish the offense of facilitating the transportation of opium.

STATUTE INVOLVED

The Act of February 9, 1909, 35 Stat. 614, as amended, 21 U. S. C. 174, provides in part:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had

possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

Petitioner was indicted in the District Court for the Northern District of California in two counts charging violations of the Jones-Miller Act (21 U. S. C. 174). The first count charged that on or about August 12, 1944, petitioner had concealed and facilitated the concealment of 105 tins of smoking opium; the second charged that on or about August 13, 1944, he had facilitated the transportation of the same amount of opium (R. 2–3). The jury returned a verdict of guilty on both counts (R. 11–12), and petitioner was fined $5,000 and sentenced to imprisonment for ten years on each, the prison sentences to run consecutively (R. 17–18). The Circuit Court of Appeals for the Ninth Circuit affirmed the conviction in a *per curiam* opinion (R. 196–198).

The evidence for the Government may be summarized as follows:

Petitioner lived in Santa Cruz, California, where he operated an amusement concession on the boardwalk (R. 26). Agents of the Bureau of Narcotics began a surveillance of him on March 2, 1944, which was continued until shortly before his arrest in August of that year (R. 87, 121).

An undercover agent, Pocoroba, arrived in Santa Cruz on May 1, 1944, soon struck up an acquaintance with petitioner, and became very friendly with him (R. 25–27, 45–47). During the course of a conversation, petitioner brought up the subject of narcotics (R. 48) and said that he would furnish opium (R. 28, 48). Pocoroba said that he had friends in Chicago who would be interested, but after he had shown petitioner a couple of letters purporting to come from these friends, petitioner said he would deal only in 50-can lots at $225 to $250 a can (R. 27–28, 50–51). Petitioner suggested that Pocoroba have his son, an instructor in the Army Air Corps, fly to Mexico or Canada and return with a supply of opium (R. 30, 51–52, 79).

Pocoroba was introduced to Tocco and Barri, two New Yorkers, and saw them at petitioner's home (R. 28–30, 44). Barri told Pocoroba that he had come to Santa Cruz to purchase opium and that he had given petitioner $22,000 for 105 tins (R. 61, 74).[1] On August 8, 1944, Tocco and Barri purchased a considerable amount of brown wrapping paper and brown gummed paper tape (R. 85–86, 87). On August 9 petitioner drove Tocco and Barri to San Francisco in his car (R. 89, 99, 123); they took with them a tan leather

[1] This conversation did not take place in petitioner's presence, but it was developed by petitioner's attorney during cross-examination of agent Pocoroba (R. 61).

bag and a dark handbag (R. 90, 99–100, 109, 110, 123–124) which appeared to be empty (R. 84–85). Tocco went into the Santa Fe railroad ticket office in San Francisco and remained about twenty-five minutes (R. 99, 107, 116). The bags were then taken to the house of a friend of petitioner (R. 83–84), but this man refused to let them load the "stuff" there (R. 33, 34). Petitioner returned to Santa Cruz the same night and asked Pocoroba to accommodate Tocco and Barri in his beach cabin if they should return (R. 32, 52–53, 91). Pocoroba consented (R. 53). On August 10, Barri, suspecting that he was being shadowed in San Francisco, returned to Santa Cruz and came to Pocoroba's cabin (R. 33, 74, 92). He was so nervous that he would not leave the cabin, and he asked Pocoroba to call Tocco in San Francisco to tell him to bring the suitcases back (R. 53). That night petitioner came to the cabin and there was some discussion of the occurrences in San Francisco; petitioner said, "I had the man bring the stuff in San Francisco, and from San Francisco he has to bring it here" (R. 33). Tocco came to the cabin on the evening of Friday, August 11, bringing the grips with him (R. 33–34, 54, 76).

On Saturday morning, August 12, petitioner came to the cabin and told Barri, "The man is here again and I have already given him the money. Now, it is entirely up to you. You take

the stuff or they will dump it in the ditch" (R. 34). Tocco asked Pocoroba for permission to pack the opium in the cabin, and Pocoroba consented (R. 35). Some time after 11:00 that night, petitioner entered the cabin carrying a pasteboard box covered with a newspaper which he handed to Tocco; after about five minutes he returned with a similar box which he also gave to Tocco, and remained just long enough to take a drink; there was no conversation, but as petitioner left he said to Tocco, "I will pick you up at 5:00 o'clock" (R. 35, 55–58, 77, 79, 154–155). Tocco and Barri then took cans of opium from the pasteboard boxes, wrapped them in the brown paper, taped them, and packed them in the suitcases (R. 35–37, 58–59, 63, 76, 155). They completed the packing about 1:00 a. m. and thereafter Pocoroba, Tocco, and Barri all went to bed (R. 37–38, 63–64).

At 3:30 on the morning of Sunday, August 13, someone came to the cabin door and said to Tocco, "Let's get the grips and let's go" (R. 38, 64–66, 77, 79); Pocoroba had no doubt that the voice was petitioner's (R. 77, 79, 80). Tocco then took the bags and went out (R. 38). Between 9:15 and 9:30 that morning, petitioner's automobile was observed entering the driveway leading to his home (R. 112, 115–116). Several days later petitioner told Pocoroba that he had taken Tocco to Berkeley (R. 42).

On August 16, Pocoroba asked petitioner to get him ten cans of opium. Petitioner answered that it was not his policy to deal in small amounts, but that he would do it for $225 a can. (R. 71–73, 78.) Tocco was arrested in Chicago that day with the suitcases and the opium shortly after he had alighted from a train arriving from San Francisco (R. 126–130). Petitioner was arrested in Santa Cruz later the same day (R. 113).

The pasteboard boxes which petitioner had carried into the cabin were found and were shown to bear opium stains (R. 39, 59–60, 101, 113, 125–126, 152).

ARGUMENT

Petitioner's asserted grounds of error can be reduced to two, neither of which, we submit, has any merit.

1. Petitioner's first contention is that he is being punished twice for the same offense (Pet. 6, 8–11, 16–17, 19–31). He asserts that the evidence shows that the concealment of the opium and the transportation thereof were one unbroken and continuous transaction, in which concealment was only incidental to transportation (Pet. 6, 20–24). He then argues that where one criminal act is only incidental to another, the offense is single (Pet. 6, 24–28), and for this proposition he cites *Ex parte Nielsen,* 131 U. S. 176; *Schroeder* v. *United States,* 7 F. 2d 60 (C. C. A. 2); *Copperthwaite* v. *United States,* 37 F. 2d 846

(C. C. A. 6); *Morgan* v. *United States,* 294 Fed. 82 (C. C. A. 4); and *Miller* v. *United States,* 300 Fed. 529 (C. C. A. 6). But when these cases speak of one criminal act as "incidental" to another, they mean that the evidence which establishes the second act is sufficient in itself to establish the first act also. Thus, in the *Nielsen* case, proof of unlawful cohabitation established adultery; in the *Schroeder* case, proof of transportation established possession; in the *Copperthwaite* case, proof of purchase and sale of unstamped morphine established the buying and selling of morphine known to have been unlawfully imported; in the *Morgan* case, proof of unlawful manufacture of whiskey established possession; and in the *Miller* case, proof of sale established possession. But the cases are careful to point out that "possession for a sustantial time, followed by a sale, might be two distinct offenses," *Miller* v. *United States, supra,* at p. 534, and they reiterate the rule that a single transaction is punishable as two offenses where each offense requires proof of a fact which the other does not.[2] This rule has frequently been applied to cases involving concealment, transportation, purchase, sale,

[2] *Blockburger* v. *United States,* 284 U. S. 299; *Albrecht* v. *United States,* 273 U. S. 1, 11–12; *Morgan* v. *Devine,* 237 U. S. 632; *Ebeling* v. *Morgan,* 237 U. S. 625; *Gavieres* v. *United States,* 220 U. S. 338.

and possession of narcotics.[3] Applying the rule to petitioner's case, there are three reasons why he was properly found guilty of two offenses: (1) the evidence does not show one undivided transaction, so far as petitioner is concerned, for there was a break between his actions in facilitating concealment at the cabin and his later actions in facilitating the transportation from the cabin; (2) even if the transaction could be considered as continuous, different facts were proven to establish that he facilitated concealment at the cabin and that he facilitated transportation from the cabin; (3) at all events, even if both acts had occurred simultaneously, each would require the proof of a different fact, for there may be transportation without concealment, and vice versa. Consequently, we think petitioner's contention that the one offense was only incidental to the other is without merit.

Petitioner further asserts that, since all the prohibited acts are set out in one statute coupled with the disjunctive "or," it could not have been the intent of Congress to punish each act separately where all occur in one continuous operation (Pet. 9–10, 28–31). The effect of this would

[3] *Blockburger* v. *United States*, *supra*, note 2; *Gargano* v. *United States*, 140 F. 2d 118 (C. C. A. 9); *Palmero* v. *United States*, 112 F. 2d 922, 924 (C. C. A. 1); *Yep* v. *United States*, 81 F. 2d 637 (C. C. A. 10), reversed on other grounds, 83 F. 2d 41; *Silverman* v. *United States*, 59 F. 2d 636, 637–638 (C. C. A. 1), certiorari denied, 287 U. S. 640; *Parmagini* v. *United States*, 42 F. 2d 721, 724–725 (C. C. A. 9), certiorari denied, 283 U. S. 818.

be to nullify the rule set out in the preceding paragraph so far as statutes of this nature are concerned. There is no evidence that this is what Congress intended. This Court has said, "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." *Albrecht* v. *United States, supra,* at p. 11. And in speaking of the various orders requiring the Japanese to move from prohibited areas and report to relocation centers, this Court said, "Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense." *Korematsu* v. *United States,* 323 U. S. 214, 222. Petitioner cites *United States* v. *Adams,* 281 U. S. 202, in which two false entries in the books of a bank, based upon a single draft, were held to constitute a single crime. Under this holding, petitioner could not be punished twice for concealing two cans of opium at the same time and in the same place. But the statute[4] involved in the *Adams* case enumerates several offenses, including embezzlement of the bank's funds, issuance of a bill of exchange without authority, and the making of false entries, and the case does not say that these separate offenses are not separately punishable

[4] 12 U. S. C. 592.

when connected in a single transaction.[5] Cf. *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 552.

2. Petitioner's second contention is that there was no evidence that he had facilitated the transportation of the opium aside from his own extrajudicial statement to Pocoroba that he had taken Tocco to Berkeley (Pet. 7, 9, 11, 16–17, 19, 32–36).[6] The independent proof necessary to corrob-

[5] The holding of the *Adams* case has not been cited in this or any other federal court. In a later case a bank teller who made two false entries on the same day, both with the intent of covering a shortage in his cash account, was apparently given separate sentences without disapproval by this Court. *United States* v. *Giles*, 300 U. S. 41.

[6] At the close of the Government's case, petitioner moved for a directed verdict, which was denied (R. 154, 157). Petitioner then took the stand in his own behalf and at the close of his testimony rested without renewing the motion for directed verdict (R. 187). It is well settled that petitioner has no standing to raise the issue of the sufficiency of the evidence when he fails to renew his motion at the close of his own case. *Lambert* v. *United States*, 101 F. 2d 960, 963 (C. C. A. 5); *Heskett* v. *United States*, 58 F. 2d 897 (C. C. A. 9), certiorari denied, 287 U. S. 643; *Hauptman* v. *United States*, 43 F. 2d 86 (C. C. A. 9), certiorari denied, 282 U. S. 900; *Jezewski* v. *United States*, 13 F. 2d 599 (C. C. A. 6), certiorari denied, 273 U. S. 735. When the objection has not been properly preserved, an appellate court will reverse only upon a showing of plain error resulting in a denial of justice. *Wiborg* v. *United States*, 163 U. S. 632, 658; *Weems* v. *United States*, 217 U. S. 349, 362. The circuit court of appeals is required to make at least such an examination of the record as will satisfy it that no such error is present. *Hemphill* v. *United States*, 312 U. S. 657, reversing, *per curiam*, 112 F. 2d 505 (C. C. A. 9). The record reveals no such error here, and it is not alleged that the court of appeals refused to consider the question as it had done in the *Hemphill* case.

orate an admission need not be such as to establish the corpus delicti in itself. "Any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof." *Daeche* v. *United States*, 250 Fed. 566, 571 (C. C. A. 2).[7] We think the independent evidence here was sufficient. When he brought the opium to the cabin, petitioner told Tocco he would call for him at 5:00 o'clock (R. 35, 56). At 3:30 a. m., he did call for Tocco and the two went off with the bags (R. 38, 65, 80). Between 9:15 and 9:30 that morning, his car was seen returning to his home (R. 112). Three days later Tocco was arrested in Chicago with the bags shortly after he had alighted from a train arriving from San Francisco (R. 126–127). These circumstances sufficiently corroborate petitioner's statement that he drove Tocco to Berkeley.

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[7] See also *United States* v. *DiOrio*, 150 F. 2d 938 (C. C. A. 3), certiorari denied November 19, 1945, No. 502, this Term; *Evans* v. *United States*, 122 F. 2d 461, 465 (C. C. A. 10), certiorari denied, 314 U. S. 698; *Ryan* v. *United States*, 99 F. 2d 864, 869–870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *Oldstein* v. *United States*, 99 F. 2d 305 (C. C. A. 10); *Forte* v. *United States*, 94 F. 2d 236, 237–243 (App. D. C.); *Jordan* v. *United States*, 60 F. 2d 4, 5 (C. C. A. 4), certiorari denied, 287 U. S. 633; *Wynkoop* v. *United States*, 22 F. 2d 799 (C. C. A. 9).

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions or important question of law is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

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